## RECENT CASES

**Civil Procedure—Code Pleading—Joinder of Actions on Two Several Contracts of Insurance**—Plaintiff's complaint set forth an unsatisfied judgment obtained against the insured on a lump sum verdict for personal injuries and property damage, and also the two insurance policies issued by the defendant companies, whereby one company insured the insolvent tortfeasor against liability for injuries to persons, and the other against liability for injuries to property. Defendants' demurrers, on the ground that liability was several and the causes of action were therefore improperly joined, were sustained, and plaintiff was given leave to amend. The amended complaint contained the additional allegation that, since the judgment was for a lump sum, it was impossible to ascertain the exact liability of each defendant, and that, consequently, both defendants were interested and necessary parties for a complete determination of the controversy. Defendants appeal from an order overruling their demurrers, on the same grounds, to the amended complaint. *Held,* by a two to two decision, that the order should be affirmed. The affirming opinion decided that, despite the fact that the contracts were several, the amended complaint showed sufficient cause to allow a joinder of the defendants under the Code provision allowing joinder of a party defendant ". . . who is a necessary party to a complete determination . . . of the questions involved. . . ." [1] The contrary opinion declared that the causes of action were improperly joined, under another Code provision,[2] since they did not both ". . . affect all the parties to the action. . . ." *Adderton v. Aetna Casualty and Surety Co.,* 189 S. E. 736 (S. C. 1937).

In this case there is presented the conflict between two sections of the Code of Civil Procedure, one involving the joinder of parties defendant, and the other, the joinder of actions. The former, on which the affirming opinion is based, is sufficiently broad to carry out the purpose of the Code makers to adopt the flexibility of equity rules.[3] Consequently, the conclusion permitting the joinder of these two defendants seems amply justified.[4] On the other hand, the section governing the joinder of causes of action provides that all the causes joined must affect all the parties to the action.[5] Manifestly, if the definition of a cause of action may be stated as the facts from which the plaintiff's rights and the defendant's liabilities arise,[6] the terms of the Code are not satisfied, for the two contracts of insurance certainly do not affect both companies, and on this reasoning, the causes of action could not be joined.[7] This restriction on the convenient practice of joining actions where the facts constituting the several causes of action are practically the same has been eliminated in some jurisdictions by changes in the Code.[8] Although it was certainly expedient [9] in the instant case

1. 1 S. C. Civ. Code (1932) § 404.
2. *Id.* § 487.
3. Clark, *The Code Cause of Action* (1924) 33 Yale L. J. 817, 818.
4. Powell v. Powell, 48 Cal. 234 (1874); Fairfield v. Southport Nat. Bank, 77 Conn. 423, 59 Atl. 513 (1904).
5. 1 S. C. Civ. Code (1932) § 487.
6. Emerson v. Nash, 124 Wis. 369, 102 N. W. 921 (1904); Pomeroy, Code Remedies (5th ed. 1929) § 347; see Clark, Code Pleading (1928) c. 2, § 19.
7. Powell v. Powell, 48 Cal. 234 (1874); State v. Krause, 58 Kan. 651, 50 Pac. 882 (1897); see Ellicott v. McNeil & Sons, 206 App. Div. 441, 444, 201 N. Y. Supp. 500, 501 (1st Dep't, 1923).
8. In England, the court is given entire discretion. Note (1934) 7 So. Calif. L. Rev. 469, 470. The Arizona and New York Codes do not contain this provision. Clark, Civil Procedure (1928) 302, n. 34. And in rule 26, Rules of Practice in Equity, 226 U. S. 655

to permit joinder of the two actions, since the two defendant companies seem to have been factually, if not technically, the same entity,[10] and also because a multiplicity of suits was thereby avoided,[11] yet such judicial disregard of an express provision of the Code is to be deplored. The elimination of provisions which contradict the generally liberal policy of the Code should properly be left to the legislature.[12]

**Constitutional Law—Applicability of Federal Interpleader Act When Several States Seek to Levy Inheritance Taxes Upon Same Property—** Decedent left tangible property in both California and Massachusetts, as well as a considerable amount of intangible property. Claiming decedent's domicile to be within their respective jurisdictions, tax officials of each state sought to levy an inheritance tax upon the transfer of all of the intangible property. Plaintiff, executor, filed a bill in the nature of a bill of interpleader, joining the tax officials of both states as defendants, in order to have determined which state could constitutionally levy the tax. In the District Court, the California officials moved for dismissal of the bill on the ground, inter alia, that the suit was barred by the Eleventh Amendment, since it was in substance a suit against the state. The motion was denied [1] and certiorari refused by the Supreme Court.[2] Subsequently the California officials appealed to the Circuit Court. *Held* (one judge dissenting), that the bill should be dismissed for want of jurisdiction. *Riley v. Worcester County Trust Co.*, C. C. A. 1st, (1937) 4 U. S. L. WEEK 950.

That a given estate should be subjected by several states to inheritance taxes upon the same property, while similar estates are subjected merely to one tax by one state, seems highly inequitable.[3] None the less, exactly this sort of discrimination occurred in the famous *Dorrance* litigation,[4] wherein both Pennsylvania and New Jersey adjudicated the decedent's domicile to be within their respective jurisdictions, and thereafter succeeded in levying large inheritance taxes upon the transfer of the same intangible property. It was in order to prevent a re-enactment of the *Dorrance* fiasco that the present bill was filed

(1912), there is an alternative provision to this requirement, which allows joinder ". . . . in order to promote the convenient administration of justice." In California, liberal provisions allowing joinder of parties have been held to govern the section on joinder of actions. Peters v. Bigelow, 137 Cal. App. 135, 30 P. (2d) 450 (1934).

9. As was suggested by the dissenting judge in the instant case, at 946, it seems possible for plaintiff to recover on his lump judgment by an allocation of the damages by a jury in a suit against the companies individually.

10. These two companies operate through the same home office, have the same agent as representative, and print their policies on the same piece of paper.

11. Douglass v. Walker, 133 Cal. App. 423, 24 P. (2d) 515 (1933). *Cf.* the more liberal result under the N. Y. Civ. Prac. Act, § 258, in Bossak v. National Surety Co., 205 App. Div. 707, 200 N. Y. Supp. 148 (1st Dep't, 1923).

12. See the conclusion reached in Note (1934) 7 So. CALIF. L. REV. 469, wherein it is suggested that, in the absence of legislative action, rules of court should be adopted to treat joinder of parties and of causes of action in the same manner, as few cases will arise to give opportunity for judicial interpretation.

1. Worcester County Trust Co. v. Long, 14 F. Supp. 754 (D. C. Mass. 1936), 49 HARV. L. REV. 1378, 31 ILL. L. REV. 546, 11 TEMP. L. Q. 103.

2. Riley v. Worcester County Trust Co., 57 Sup. Ct. 29 (1936).

3. Once the social desirability of permitting the passage of property by inheritance is granted, this conclusion is obvious.

4. Dorrance's Estate, 309 Pa. 151, 163 Atl. 303 (1932), *cert. denied*, 287 U. S. 660 (1932); Dorrance v. Martin, 116 N. J. L. 362, 184 Atl. 743 (1936), *cert. denied*, 298 U. S. 678 (1936); see Note (1932) 81 U. OF PA. L. REV. 177; (1934) 18 MINN. L. REV. 736; (1934) 34 COL. L. REV. 1151, 1374.

under the terms of the recently broadened Federal Interpleader Act.[5] In denying the existence of any jurisdiction to entertain the suit, the majority of the court places upon the prohibition of the Eleventh Amendment most of the stress of an unclear opinion.[6] But in the past, judicial construction has made it plain that this Amendment does not prevent a suit to restrain acts of state officers which infringe upon the safeguards of the Federal Constitution.[7] Therefore, if it is violative of the Fourteenth Amendment for more than one state to levy a tax in the instant situation, then the officials of one state certainly are acting without authority, and may be enjoined from pursuing their improper course of conduct. By the same token, of course, one set of officials is acting constitutionally, and hence, at first blush, should not be subject either to suit or injunction. But as the cases stand, this logical difficulty should afford no ground for refusing to entertain the instant suit. It is equally true of any bill for an injunction against the doing of an unconstitutional act by a state officer, that it may present a situation in which the jurisdiction of the court depends on precisely the same issues as does the ultimate substantive constitutional question.[8] Thus it seems that whether or not the Interpleader Act may be employed to prevent multiple inheritance taxation of intangibles should depend simply on whether the Fourteenth Amendment precludes all but one of the mutually inconsistent findings of domicile. That the Fourteenth Amendment does not so operate is the belief implicit in the majority opinion in this case. There are strong indications that on this point the Supreme Court may take a different view,[9] although the matter is in no sense free from doubt.[10]

**Constitutional Law—Validity of Statute Requiring Flares in Front and Rear of Parked Trucks and Busses**—In an action for damages caused by the plaintiff's running into the back of the defendant's truck while it was parked

5. 49 STAT. 1096 (1936); 28 U. S. C. A. § 41 (26) (Supp. 1936). An excellent discussion may be found in Chafee, *The Federal Interpleader Act of 1936* (1936) 45 YALE L. J. 963, 1161.

6. The majority of the court seemed to regard the suit as directly in the face of the Eleventh Amendment because the complainant had not specifically alleged that the officials of the two states had determined the question of domicile arbitrarily. But it is commonly understood that as a matter of law a man has but one domicile. Thus it might have been inferred from the facts that one of the sets of officials was acting arbitrarily. The Federal Equity Rules provide that the court must disregard any defect in the proceedings which does not affect the substantial rights of the parties. See Rule 19, Rules of Practice in Equity, 226 U. S. 654 (1912). The majority opinion also argued that the two states did not have "adverse" interests within the language of the Act. But if only one state is entitled to tax, it is hard to see why the states do not have "adverse" interests within the ordinary understanding of the term. *Cf.* First Nat. Bank of Boston v. Maine, 284 U. S. 312, 327 (1932). Thus the nature of the objections raised by the majority of the court seems to indicate that the real basis for its decision is a feeling that the Fourteenth Amendment may not be availed of in the instant situation where several states *adjudicate* the domicile of the deceased to be within their respective jurisdictions.

7. Poindexter v. Greenhow, 114 U. S. 270 (1885); Green v. Louisville Ry., 244 U. S. 499 (1917); Sterling v. Constantin, 287 U. S. 378 (1932).

8. *Cf.* Poindexter v. Greenhow, 114 U. S. 270 (1885); *Ex parte* Young, 209 U. S. 123 (1908).

9. It is impossible to state the extent to which the Supreme Court has set its face against multiple taxation. Five years ago it would have seemed relatively clear that the Fourteenth Amendment could be availed of in this situation if the question had been brought squarely before the court. Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930); First Nat. Bank of Boston v. Maine, 284 U. S. 312 (1932).

10. Several cases throw some doubt on the attitude of the Supreme Court toward multiple taxation in general. Lawrence v. State Tax Comm., 286 U. S. 276 (1932); New York *ex rel.* Cohn v. Graves, 57 Sup. Ct. 466 (1937); New York *ex rel.* Whitney v. Graves, 57 Sup. Ct. 237 (1937), 37 COL. L. REV. 661.

on the road at night, the plaintiff relied upon the defendant's failure to comply with a statute making it unlawful for any person operating a truck or motor bus to stop such vehicle on the highway for longer than three minutes during the hours of darkness, without placing a lighted torch or lantern at the side of the road, between one hundred and one hundred and fifty feet to the rear of the vehicle.[1] *Held* (one justice dissenting), that this statute arbitrarily discriminates against owners of trucks and motor busses and hence violates the equal protection clause of the Fourteenth Amendment.[2] *Zink v. Kessler Trucking Co.*, 190 Atl. 637 (Del. Super. Ct. 1937).

The equal protection clause does not require that a state law operate upon all persons equally, but rather the constitutional guarantee is satisfied if the law operates equally upon all persons within a designated class,[3] provided that that class has a logical connection with the object sought to be accomplished by the law.[4] It is the latter condition of constitutionality, proper classification, which gives rise to the problem in the instant case. The proper judicial approach to the problem of classification has been clearly defined by the Supreme Court numerous times. Thus, the one who assails the classification as unreasonable has the burden of proving it to be so;[5] and this burden is sustained only if the classification is shown to preclude the assumption that it is based upon some factual distinction within the knowledge of the legislature.[6] Nor is it sufficient to show that the whole field of possible abuses is not covered, so long as it appears that the danger legislated against is characteristic of the class named.[7] In the instant case, the obvious purpose of the Act was to reduce the loss of life and property caused by the collision of one vehicle with another parked on the road at night. In view of the difference in width of the average truck or motor bus and of the average pleasure car, it would seem that they may be separately classified in reference to their potentiality as dangerous obstacles in the highway.[8] Certainly, any steps the legislature takes to reduce the well-known hazards of travel should not be brushed aside by the judiciary without more evidence of arbitrary classification than appears in the present case.

**Contracts—Gold Clause—Power of Federal Government to Call for Redemption Bonds Containing Gold Clauses by Offer of Present Currency**—The holder of a First Liberty Loan bond, payable in 1947, instituted suit for interest which, plaintiff alleged, fell due December 15, 1935. The bonds provided that "The principal and interest . . . shall be payable in United States Gold coin of the present standard of value . . . "; that the bonds could be redeemed any time after June 15, 1932 at ". . . the face value thereof and in-

1. DEL. REV. CODE (1935) § 5668 (f).

2. U. S. CONST. Amend. XIV. ". . . nor deny to any person the equal protection of the laws."

3. Stebbins v. Riley, 268 U. S. 137, 142 (1924); Chicago, M. & St. P. Ry. v. Westly, 178 Fed. 619, 624 (C. C. A. 8th, 1910).

4. Southern Ry. v. Greene, 216 U. S. 400 (1910); Chicago Dock Co. v. Fraley, 228 U. S. 680 (1913).

5. Metropolitan Casualty Ins. Co. v. Brownell, 294 U. S. 580, 584 (1935).

6. Missouri, Kan. & Tex. Ry. v. Cade, 233 U. S. 642, 650 (1914).

7. Central Lumber Co. v. South Dakota, 226 U. S. 157, 160 (1912); Patsone v. Pennsylvania, 232 U. S. 138, 144 (1914).

8. The normally greater width of a truck or motor bus causes such vehicles to project further out into the road and thus causes greater danger. See Garneau v. Eggers, 113 N. J. L. 245, 174 Atl. 250 (Sup. Ct. 1934). Note, too, that the extra weight of the ordinary truck or bus might cause a more serious accident. *Cf.* Consumers Co. v. Chicago, 298 Ill. 339, 131 N. E. 628 (1921).

terest accrued at the date of redemption, on notice published at least three months prior to the redemption date . . . "; and that "From the date of redemption designated in any such notice, interest on the bonds called for redemption shall cease . . . ." [1] The government's defense was that notice calling this series of bonds for payment on June 15, 1935 had been duly published, thereby avoiding interest coupons maturing after that date. But plaintiff, who is not averse to receiving present-day currency, contended that the bond could not have been paid in gold coin in accordance with the condition of redemption because of the recent change in our monetary policy,[2] and that the notice was therefore ineffectual. *Held,* that the government was liable for the interest coupons. *Machen v. United States,* 87 F. (2d) 594 (C. C. A. 4th, 1937).

This decision represents a literal application of the generality promulgated in *Perry v. United States,*[3] one of the famed gold clause decisions, wherein the Supreme Court declared that existing national obligations were (at least technically) not affected by the devaluation of our dollar. The instant court, refusing to adopt any of the various suggested ingenious methods of construction,[4] ruled that the words on the face of the bonds made the offer of payment in gold value a condition precedent to redemption, and that, accordingly, the Treasury Department had failed to make the bonds fall due prematurely because its offer did not measure up to the terms of the government's contractual obligation. There can be little doubt of the logical correctness of the decision.[5] But the result attained seems highly undesirable, for it places the government in an anomalous situation. Although, according to the *Perry* case, it may pay off gold clause bonds at maturity [6] in present-day currency, it cannot exercise its option of accelerating the maturity date by an offer of payment in the same form of money. Consequently, it would perhaps have been more expedient to have ruled the notice in the instant case a substantial compliance with the condition and, therefore, an effectual recall of the bonds, on the theory that, on the basis of the declaration in the *Perry* case that payment in present-day currency is a transmission of the same quantum of purchasing power to the payee as payment in gold value,[7] the present plaintiff was tendered substantially what he had bargained for.[8]

1. Instant case at 595 sets out the terms of the bonds in full.

2. The reduction of the weight of the gold content of the dollar was ordered in the President's Proclamation of January 31, 1934. 31 U. S. C. A. § 821 note, No. 2067 (Supp. 1936). This was later ratified by Congress. 48 STAT. 343 (1934), 31 U. S. C. A. § 824 (Supp. 1936).

3. 294 U. S. 330 (1935), 83 U. OF PA. L. REV. 686. After upholding the sanctity of the government's obligation, the Court denied recovery to a bondholder seeking payment in "gold value" on the ground that he could show no damages resulting from a payment in currency because, the Court said, he had received the same purchasing power. It is perhaps of importance to note that one of the majority judges, in this five to four decision, wished to limit the holding to the facts of that case. See the concurring opinion of Stone, J., 294 U. S. 330, 358.

For an able critical discussion of this decision see Dickinson, *The Gold Decisions* (1935) 83 U. OF PA. L. REV. 715, *720 et seq.*

4. Instant case at 596-597. The court refused to follow the Court of Claims in construing the requirement to give notice as independent of the provision of the bonds requiring redemption in gold coin. The Court of Claims decision, referred to in the instant case at 596, has apparently not yet been reported. Dixie Terminal Co. v. United States.

5. The instant case is the only decision on this point except for the Court of Claims decision which, seemingly, dodged the real issue. *Supra* note 4.

6. As a matter of fact, the *Perry* case also arose from a recall for redemption; but the point litigated was whether or not the government could give present currency in payment of these bonds.

7. 294 U. S. 330, at 355.

8. The instant court expressly rejected this argument on the ground that it would be contrary to the *Perry* decision to allow the government to invalidate its contract in this

**Corporate Reorganization—Inclusion of Allied Corporations in Reorganization Proceedings under 77B**—The X and Y Hotel Companies filed separate petitions for reorganization under *77B* [1] in the same district court. The X Company was the lessor and operator of the property of the Y company, and its largest obligation was the rent payable to the Y company. Since rehabilitation of either company or of both companies depended on a satisfactory adjustment of the lease and rentals between the two, the Y company petitioned for a consolidation of both proceedings in order to effect a proposed joint plan of reorganization. The petition was approved, but subsequently the X company filed a petition to revoke the order of consolidation on the ground that since the Y company had instituted separate proceedings, it must thereafter proceed independently. *Held,* petition dismissed, since *77B* does not specifically exclude the right to consolidation after institution of separate proceedings, and the broad powers granted to effect the most feasible reorganization possible include the power to order such a consolidation. *In re Mallow Hotel Corp.*, 17 F. Supp. 877 (M. D. Pa. 1937).

Section *77B* limits the right to propose a plan of reorganization to the debtor corporation, or its creditors or stockholders.[2] There would therefore seem to be no power in the court to make an order giving an independent corporation, unconnected with the debtor other than by a lease agreement, the right to file a joint plan of reorganization which would bind the debtor, its creditors and stockholders.[3] Furthermore, admitting that a corporation not yet under *77B* could intervene and be included in the debtor's plan,[4] it does not follow that there could be such intervention after separate reorganization proceedings by both debtor and intervening corporations, even though the intervenor seeks to be included in the debtor's plan rather than to propose a joint plan. The objection is that, the intervenor having already initiated separate proceedings, it would have to abandon them in order to come within the debtor's plan; and the Act provides only for liquidation of a corporation which abandons its plan and terminates its reorganization proceedings.[5] Manifestly, the decision in the instant case is desirable from the standpoint of efficiency and feasibility of reorganization,[6] and is

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manner. Instant case at 598. It is submitted, though, that the result thereby attained would be more in keeping with the practical result of the *Perry* case. See *supra* note 3.

On the subject of excuse of a condition for virtual compliance therewith, see RESTATEMENT, CONTRACTS (1932) §§ 275, 294, 301, 302. See also 3 WILLISTON, CONTRACTS (Rev. ed. 1936) §§ 805-806.

1. 48 STAT. 912 (1934), 11 U. S. C. A. § 207 (a) (1936).

2. 48 STAT. 912, 917 (1934), 11 U. S. C. A. §§ 207 (a), (d) (1936); 3 GERDES, CORPORATE REORGANIZATIONS (1st ed. 1936) §§ 1107, 1108, 1109.

3. 48 STAT. 912 (1934), 11 U. S. C. A. § 207 (a) (1936): "Any corporation . . . substantially all of whose properties are operated by such debtor under lease or operating agreement, may file, with the court in which such debtor had filed its petition or answer, and *in the same proceeding,* a petition stating . . . that it desires to effect a plan of reorganization *in connection with,* or *as a part of,* the plan of reorganization of such other debtor." (Italics supplied.) The court in the instant case, at page 878, relies to some extent upon this section as authority for its decision that the Y company could propose a joint plan; but a careful analysis indicates that the intervening corporation is not given the power to propose an *exclusive* plan, nor can the debtor's plan be totally eliminated by the approval of the petition of the intervening corporation.

4. *Ibid.*

5. 48 STAT. 917 (1934), 11 U. S. C. A. § 207 (c) (8) (1936): ". . . if a plan of reorganization is not proposed or accepted . . . the judge may . . . direct the estate to be liquidated, or direct the trustee or trustees to liquidate the estate."

6. The instant decision relied to some extent on the power given by the Judicial Code to consolidate causes of like nature. 3 STAT. 21 (1813), 28 U. S. C. A. § 734 (1928): "When causes of a like nature or relative to the same question are pending before a court of the

in accordance with the practice permitted under equity receivership,[7] the adjective principles of which are generally adopted by the reorganization court. However, the unfortunate wording of the Act has created a situation which might better be overcome by legislative amendment than by judicial legislation inconsistent with specific statutory provisions.

**Corporations—Power of Board of Directors to Make Long Term Contract of Employment**—The board of directors of the defendant corporation entered into a contract with the plaintiff employing him as an adviser to the corporation for ten years at an annual salary of $24,000. The by-laws of the corporation provided that the board of directors be elected annually, and that the named officers, not including an "adviser", be elected by the directors for one year. After nine months the plaintiff was summarily discharged and brings this action for breach of contract. *Held,* that the contract was void, since it deprived the shareholders of the right given to them by the by-laws to elect annually a board of directors to carry out their administrative ideas, and since it was contrary to the public policy, as indicated by statute,[1] that such an association, its officers and directors should be under the close and constant supervision of the state banking commissioner. *Beaton v. Continental Southland Savings & Loan Ass'n,* 101 S. W. (2d) 905 (Tex. Civ. App. 1937).

It has been held that a board of directors has no power to make a contract of employment which would be perpetual or for the lifetime of the employee because such contracts are unreasonable in that they bind the hands of future boards.[2] The same result has been reached in cases involving long term contracts when such contracts were prohibited by statute [3] or by the by-laws of the corporation, expressly or by implication.[4] But in the instant case there are present no such operative facts, and only by forcing the interpretation of the by-laws of the corporation can it be said that such a contract as was herein entered into was forbidden. In the absence of any prohibition, directors may hire employees for a period extending beyond the directors' term of office.[5] The cases cited as authority by the court in the instant case can all be distinguished in that they fall into one of the banned categories previously men-

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United States, or of any Territory, the court . . . may consolidate said causes when it appears reasonable to do so." This section should not alone give the power to do that which the subsequently enacted *77B* does not permit.

7. An example of consolidation in an equity receivership proceeding is where the receivership suit and a foreclosure suit have been permitted to be consolidated. Bankers Trust Co. v. Missouri, K. & T. Ry., 251 Fed. 789 (C. C. A. 8th, 1918); MacGregor v. Johnson-Cowdin-Emmerich, Inc., 31 F. (2d) 270 (C. C. A. 2d, 1929).

1. TEX. COMP. STAT. (Vernon, Supp. 1931) tit. 24.

2. Carney v. New York Life Ins. Co., 162 N. Y. 453, 57 N. E. 78 (1900); Clifford v. Firemens Mut. Benev. Ass'n, 259 N. Y. 547, 182 N. E. 175 (1932), *aff'g,* 232 App. Div. 260, 249 N. Y. Supp. 713 (2d Dep't, 1931); Beers v. New York Life Ins. Co., 66 Hun 75, 20 N. Y. Supp. 778 (Sup. Ct. 1892). See General Paint Corp. v. Cramer, 57 F. (2d) 698, 703 (C. C. A. 10th, 1932). *Cf.* Townsley v. Niagara Life Ins. Co., 160 App. Div. 177, 145 N. Y. Supp. 209 (1st Dep't, 1913) (contract to continue during faithful performance of employee's duties was held not a contract for an unlimited time or for life).

3. Llewellyn v. Aberdeen Brewing Co., 65 Wash. 319, 118 Pac. 30 (1911).

4. Hunter v. Sun Mut. Ins. Co., 26 La. Ann. 13 (1874); Douglas v. Merchants Ins. Co., 118 N. Y. 484, 23 N. E. 806 (1890); Denton Milling Co. v. Blewett, 254 S. W. 236 (Tex. Civ. App. 1923).

5. Kidd v. New Hampshire Trac. Co., 74 N. H. 160, 66 Atl. 127 (1907); 2 FLETCHER, CORPORATIONS (Perm. ed. 1931) § 514. See Maryland Union Bank v. Ridgely, 1 Har. & G. 324, 432 (Md. 1827).

tioned.[6] There seems no justification in theory or in fact for holding the contract in the instant case void.[7] In effect, this decision would limit any contract of employment and, possibly, any contract which the corporation might make, to a maximum term of one year. It would prevent any long-term policy, and render difficult the acquisition of services of a highly skilled and competent employee who would usually desire assurance of employment for a longer period than one year. Moreover, the mere fact that such a contract has been entered into does not mean that the board of directors is bound to follow the advice of such employee, and if they do, there is nothing to prevent the shareholders from electing a new board the following year to disregard this advice. In no manner are the hands of the directors or shareholders tied by the contract, except insofar as the corporation is bound to pay the agreed salary to the plaintiff. In addition, there appears to be no ground for saying that such a contract is inconsistent with the public policy of supervision of the association by the state banking commissioner.[8] However, the result of the decision may be justified on non-legal grounds in that it may tend indirectly to discourage long-term contracts of service in which the duties of the employee are as vaguely defined as were those of the plaintiff "adviser" in the instant case.[9]

**Equity—Retention of Jurisdiction by Enjoining Subsequent Proceedings in Another Court**—Upon the refusal of the instant court to grant a preliminary injunction to restrain allegedly unauthorized acts by the TVA, the corporation sought the same relief in a state court in Tennessee. The bill was removed to the Federal District Court in Tennessee, and the preliminary injunction was granted, despite a defense by the TVA on the basis of the refusal of the injunction by the instant court. The TVA then brought this bill in the instant court to restrain the corporation from proceeding further with the bill or enforcing the decree of the District Court in Tennessee. *Held,* that the court had power to enjoin the corporation from interfering with the operation of the TVA by proceedings in another court, since this court had a right to retain jurisdiction which it had previously acquired, and that the case be set down for final hearing in this court. *Georgia Power Co. v. Tennessee Valley Authority,* 17 F. Supp. 769 (N. D. Ga. 1937).

Since there is apparently no precedent for this situation, the court was unable to cite controlling authority, and had to rely on cases establishing general principles applicable to the facts of this case. In issuing this injunction, the court stated that its decree in the original bill [1] became the law of the case and bound the complainant, until modified by the same court or on appeal, and that the TVA acquired definite rights thereby.[2] Although final disposition of an

6. See cases cited in the instant case at 909, all but one of which are distinguished *supra* notes 2, 3, 4.

7. In Warner v. Morgan, 81 Misc. 865, 143 N. Y. Supp. 516 (Sup. Ct. 1913), where the by-laws of a corporation authorized the directors to appoint such agents and employees as they deemed necessary and to fix their salaries and regulate their duties, the court held that a contract made by the corporation for services of a general agent for ten years was valid. The fact that, in this case, the shareholders approved the contract should make no difference, and the instant court did not consider this factor.

8. A possible explanation, although not a justification, of the court's action in this case might be the fact that the contract in question was entered into in January, 1929, for a relatively high salary of $24,000 per year for ten years, and then the depression intervened.

9. The contract is set forth in the instant case at 907-8.

1. Georgia Power Co. v. Tennessee Valley Authority, 14 F. Supp. 673 (N. D. Ga. 1936).

2. Instant case at 771.

issue on the merits may be given after a hearing on a motion for a preliminary injunction, if the merits have been sufficiently brought before the court in the briefs,[3] it is clear that there was no such disposition in the original suit, and that the more common rule against the practice was followed.[4] Since the question of the right of the TVA to continue the acts complained of had not been permanently settled, the question is raised whether another court of equity might not, in the exercise of its discretion, grant the temporary relief prayed for, pending final disposition. It would seem, however, that the rights which this court vested in the TVA by the original decree must have included the right to continue to act pending final determination of the cause, and that, therefore, that issue was then res judicata and could not properly be considered in a subsequent action in another court.[5] Moreover, the ground relied on by this court, that, once having acquired jurisdiction over the cause, it had a right to retain it, is well supported.[6] There is, also, little doubt that it may use the restraining power of the injunction to preserve its jurisdiction and to prevent multiplicity of litigation.[7] However, the complainant corporation's originally voluntary submission to the jurisdiction of this court, a fact emphasized in the opinion as invoking the maxim that he who seeks equity must do equity, does not seem to be conclusive, since it has been held that the defendant in an equity suit can not ask another court to enjoin the proceedings.[8] Of more importance is the conclusion of this court that the injunction should not be denied on the ground of laches merely because the TVA allowed the bill in the Tennessee court to proceed to the termination of the pleadings before seeking relief. The basis of the defense of laches is that the plaintiff has delayed in the assertion of a right to the disadvantage of the defendant,[9] and, as the court correctly pointed out, there was no failure on the part of the TVA to assert the right, but rather an unforeseeable failure by the District Court in Tennessee to recognize the right.[10] Thus, the opinion in this case is well supported by both reasoning and authority, and, in addition, the result must be approved as fostering comity between federal courts, albeit at the point of an injunction.

**Evidence—Husband and Wife Bastardizing Issue by Testifying to Non-access**—Plaintiff, divorced from her husband in October, 1934, gave birth six months later to the child whose paternity was at issue in this filiation proceeding brought to charge the defendant with its support. The plaintiff's mother testified to the non-access of the husband when the child was conceived; but the plaintiff and her ex-husband were not permitted to testify that they separated in 1928 and that she remained in Mississippi while he moved to Louisiana where he had continuously remained. *Held,* that the husband and wife should

3. Jackson Co. v. Gardiner Inv. Co., 200 Fed. 113 (C. C. A. 1st, 1912).

4. Miller and Lux v. Madera Canal & Irrig. Co., 155 Cal. 59, 99 Pac. 502 (1909).

5. See Southern Pac. R. R. v. United States, 168 U. S. 1, 48 (1897); Mutual Life Ins. Co. v. Newton, 50 N. J. L. 571, 577 (Sup. Ct. 1888); Cook, *Powers of Courts of Equity* (1915) 15 COL. L. REV. 228, 230.

6. Looney v. Eastern Tex. R. R., 247 U. S. 214 (1918); CLARK, EQUITY (1919) § 13; BISPHAM, PRINCIPLES OF EQUITY (11th ed. 1931) § 387.

7. Root v. Woolworth, 150 U. S. 401 (1893); see Kline v. Burke Construction Co., 260 U. S. 226, 229 (1922); Continental Ill. Nat. Bank & Trust Co. v. Chicago, R. I. & Pac. Ry., 294 U. S. 648, 676 (1935).

8. Wolfe v. Titus, 124 Cal. 264, 56 Pac. 1042 (1899).

9. Duryea v. Elkhorn Coal & Coke Corp., 123 Me. 482, 124 Atl. 206 (1924); Briggs v. Buzzell, 164 Minn. 116, 204 N. W. 548 (1925); Hydraulic Power Co. v. Pettebone-Cataract Paper Co., 198 App. Div. 644, 191 N. Y. Supp. 12 (4th Dep't, 1921).

10. Instant case at 771.

have been permitted to testify as to non-access. *Moore v. Smith,* 172 So. 317 (Miss. 1937).

Since Lord Mansfield's oft-quoted dictum in 1777,[1] it has been the generally accepted dogma of both American and English courts that neither husband nor wife can testify as to non-access so as to bastardize issue born after marriage.[2] A few American courts have held the above rule abrogated by statute,[3] but, previous to the instant case, Kansas was the only court which openly repudiated the Mansfield rule without the aid of a statute;[4] and even this jurisdiction appears to have returned to the majority rule.[5] The rule has been severely criticized by both writers[6] and courts,[7] and the only apparent reasons offered in its support are, as set forth by Lord Mansfield, "decency, morality, and public policy".[8] Whether or not there is any basis for excluding vital testimony on the theory of indecency, at least in the instant case it would hardly seem indecent or immoral for the husband to testify that he had been in Louisiana since 1928, and for the wife to testify that she had remained continuously in Mississippi during that time, especially when the testimony of strangers as to these facts is accepted.[9] Moreover, the law will permit the husband and wife to bastardize issue in any other manner, as by testimony of the wife as to her illicit relations with her paramour,[10] or by testimony of both husband and wife that there was no marriage ceremony.[11] Therefore, it is a peculiarly inconsistent policy that prohibits testimony as to non-access by those who are best qualified to testify thereto. Also, since the innocent child is adequately protected by a strong presumption of legitimacy in his favor,[12] it seems unfair to penalize the husband in favor of the wife's paramour. Thus, the decision of the instant case, though standing alone, represents the more logical and sensible rule.

**Quasi-Contracts—Recovery for Professional Services to Obtain Release of Person Adjudicated Insane**—The plaintiffs were attorneys and medical experts who rendered professional services to an incompetent in the course of habeas corpus proceedings by which it was unsuccessfully sought to procure his

1. ". . . the law of England is clear that the declarations or testimony on the stand of a father or mother cannot be admitted to bastardize issue born after marriage." Goodright v. Moss, 2 Cowp. 591 (K. B. 1777). But strangely enough the English law appeared otherwise at this time. See 4 WIGMORE, EVIDENCE (2d ed. 1923) § 2063; Note (1925) 73 U. OF PA. L. REV. 71.

2. Cases are collected in Notes (1929) 60 A. L. R. 380, (1930) 68 A. L. R. 421, (1934) 89 A. L. R. 911.

3. State v. Soyka, 181 Minn. 533, 233 N. W. 300 (1930); *In re* Wray's Estate, 93 Mont. 525, 19 P. (2d) 1051 (1933); Loudon v. Loudon, 114 N. J. Eq. 242, 168 Atl. 840 (1933) (a strong opinion that suggests the court would have repudiated the rule even in the absence of a statute), 82 U. OF PA. L. REV. 406 (1934).

4. Lynch v. Rosenberger, 121 Kan. 601, 249 Pac. 682 (1926), 75 U. OF PA. L. REV. 271 (1927).

5. See Martin v. Stille, 129 Kan. 19, 281 Pac. 925 (1929).

6. 4 WIGMORE, *op. cit.* supra note 1, at §§ 2063, 2064; Notes (1924) 73 U. OF PA. L. REV. 71, (1924) 31 HARV. L. REV. 916; (1924) 19 ILL. L. REV. 280.

7. See Lynch v. Rosenberger, 121 Kan. 601, 604, 249 Pac. 682, 684 (1926); Loudon v. Loudon, 114 N. J. Eq. 242, 246, 168 Atl. 840, 841 (1933); see also dissent of Lord Sumner, in Russell v. Russell, [1924] App. Cas. 687, 732.

8. Goodright v. Moss, 2 Cowp. 591 (K. B. 1777).

9. Wright v. Hicks, 15 Ga. 160 (1854); Gors v. Froman, 89 Ky. 318, 12 S. W. 387 (1889); State v. Shaw, 89 Vt. 121, 94 Atl. 434 (1915). In the instant case the plaintiff's mother was permitted to testify to non-access.

10. *In re* Gird's Estate, 157 Cal. 534, 108 Pac. 499 (1910); Wallace v. Wallace, 137 Iowa 37, 114 N. W. 527 (1908); Dennison v. Page, 29 Pa. 420 (1857).

11. Bellinger v. Devine, 269 Ill. 72, 109 N. E. 666 (1915); Fox v. Burke, 31 Minn. 319, 17 N. W. 861 (1883); Marshall v. Carr, 275 Pa. 86, 118 Atl. 621 (1922).

12. 5 WIGMORE, *op. cit. supra* note 1, at § 2527.

release from a state hospital. It was conceded that the plaintiffs acted in good faith. The trial judge disallowed the plaintiffs' claims against the incompetent's estate for the reasonable value of their services. *Held,* on appeal, that the plaintiffs were entitled to recover the reasonable value of their services, rendered in good faith, regardless of whether the release of the incompetent was thereby procured. *In re Weightman's Estate,* 190 Atl. 552 (Pa. Super. 1937).

The theory on which attorneys and medical experts are permitted to recover for services rendered an incompetent at his request to obtain his release is that such services are necessaries.[1] Since insane persons are incapable of contracting, their liability for necessaries is quasi-contractual,[2] an obligation being imposed by law to pay the reasonable value of benefits received where non-payment would be inequitable.[3] The majority of courts deem professional services rendered an insane person to obtain his release a benefit even though release is not obtained,[4] the benefit consisting in the protection of the incompetent's legal rights,[5] as contrasted with a material benefit to his estate, which would more naturally fall under the classification of necessaries. One court, however, reasoned that services rendered in an unsuccessful attempt to obtain release are not a benefit, and that therefore no recovery can be had.[6] The obvious virtue of this minority view is that it effectively prevents frivolous litigation and fraud on insane persons by unscrupulous attorneys, resulting in the depletion of the estates of incompetents.[7] On the other hand, to preclude recovery for services in unsuccessful habeas corpus proceedings might well endanger the power of incompetents to protect their legal rights, by making it virtually impossible for them to obtain necessary legal and medical services.[8] Thus, in the final analysis, the court in the instant case served the best interests of persons adjudicated insane in deciding that the reasonable value of the unfruitful professional services could be recovered from the estate of the incompetent, if the services were rendered in good faith, and that the incompetent could be sufficiently protected from fraud by leaving it to the discretion of the court to determine the good faith of those rendering the services.

**Real Property—Waters and Water Courses—Transmission of Electric Power to Other Land Where Indenture Granted Water Power Appurtenant to Specific Land**—Respondent purchased several mill sites with water pow-

1. *In re* Doyle's Estate, 126 Cal. App. 646, 14 P. (2d) 920 (1932); *In re* Freshour's Estate, 174 Mich. 114, 140 N. W. 517 (1913); Carr v. Anderson, 154 Minn. 162, 191 N. W. 407 (1923).

2. See 1 WILLISTON, CONTRACTS (Rev. ed. 1936) § 255.

3. See Note (1932) 17 CORN. L. Q. 502, 503.

4. *In re* Doyle's Estate, 126 Cal. App. 646, 14 P. (2d) 920 (1932); Fitzpatrick's Committee v. Dundon, 179 Ky. 784, 201 S. W. 339 (1918); Hallett v. Oakes, 55 Mass. 296 (1848); *In re* Freshour's Estate, 174 Mich. 114, 140 N. W. 517 (1913); Carter v. Beckwith, 128 N. Y. 312, 28 N. E. 582 (1891); Matter of Larner, 68 App. Div. 320, 74 N. Y. Supp. 70 (2d Dep't, 1902). Other types of services for which attorneys have been permitted to recover reasonable value from insane persons include the following: Rautenkranz v. Plummer, 75 Ind. App. 439, 130 N. E. 435 (1921) (removing guardian); Matter of Hardy, 26 App. Div. 164, 49 N. Y. Supp. 953 (1st Dep't, 1898) (defending a proceeding to have a person adjudicated insane); Ferguson v. Fitze, 173 S. W. 500 (Tex. Civ. App. 1915) (defending against criminal prosecution).

5. PA. STAT. ANN. (Purdon, 1930) tit. 50, § 171.

6. Interdiction of Grevenig, 164 La. 1026, 115 So. 133 (1927).

7. See Carter v. Beckwith, 128 N. Y. 312, 319, 28 N. E. 582, 583 (1891); see also the dissenting opinion in the instant case at 556.

8. See *In re* Doyle's Estate, 126 Cal. App. 646, 648, 14 P. (2d) 920, 921 (1932).

ers, and the indentures granting the latter contained provisions that they should be "used in and upon" their respective sites. Respondent then installed generators at the various sites, and set up a common electric transmission line which served mills on all the sites. Claimant, the canal company which had granted the sites and power rights, sought to enjoin such use of the powers. *Held*, that although the generation of the electricity is a mere change in the form of the power granted, the respondent is restricted only to application of the water to a wheel on the site, and is not prohibited from transmission of the electric power thereby generated. *Holyoke Water Power Co. v. American Writing Paper Co.*, 17 F. Supp. 895 (D. Mass. 1936).

Water power rights may be granted for limited purposes, such as for a fulling mill [1] or cabinet shop,[2] but courts have been loath to give effect to such limitations because of the retarding effect they would exert on industrial progress.[3] However, at least prior to the wide industrial use of electricity, no such reason existed for courts to disfavor provisions that the rights be used on particular land, or to restrict the meaning of these provisions, and although such stipulations have seldom been construed by the courts, they have been unqualifiedly enforced.[4] The instant case indicates that perhaps, with the advent of industrial use of electricity, a limited construction may reasonably be given to provisions restricting the place of use on the basis of the same public policy as prompted a similar restriction of limitations on purpose. It seems clear that the rights granted in these indentures were intended to be appurtenant to the particular sites, at least in the sense that the water could not be applied to a wheel on another site.[5] However, the *T. V. A.* decision indicated that the application of water to a wheel and electrical generator was not a *use* of the power inherent in the water but a mere conversion to another form of energy more susceptible of transmission.[6] In view of this concept, must the energy inherent in the power here granted be expended on the stipulated site, or may the water power be said to have been "used in and upon" the site when applied solely to a wheel and generator thereon, irrespective of where the electric energy is applied to a load? Since the grants in question were made between 1864 and 1895, it would appear that the parties contemplated that the power granted would be applied to machinery on the site to which the power was appended. But due to the then practical impossibility of wider transmission of the power, it is reasonable to conclude that the restriction was not actively intended to extend to

1. DeWitt v. Harvey, 70 Mass. 486 (1855).

2. Mandeville v. Comstock, 9 Mich. 536 (1862).

3. Luttrel's Case, 4 Co. R. 86 (K. B. 1727) (prescriptive right to water not lost by change of type of mill where used); Fisk v. Wilber, 7 Barb. 395, at 402, 403 (N. Y. 1849) (grant "to use and operation of the said grist mill . . ." of "all waters below the bottom of so much of the timber or plate as now remains upon the dam, exclusively" not limited to grist mill use); Adams v. Warner, 23 Vt. 395, at 410-412 (1851) (reservation of water for grist mill held to limit quantity, not use); see Ashley v. Pease, 35 Mass. 268, 275 (1836); GOULD, WATERS (2d ed. 1891) § 318.

4. Holyoke Water Power Co. v. Whiting & Co., 276 Mass. 528, 177 N. E. 568 (1931); Minneapolis Mill Co. v. Hobart, 26 Minn. 37, 1 N. W. 45 (1879); 3 FARNHAM, WATERS AND WATER RIGHTS (1904) 2286.

5. Similar grants were so construed in Holyoke Water Power Co. v. Whiting & Co., 276 Mass. 528, 177 N. E. 568 (1931).

6. Ashwander v. Tennessee Valley Authority, 297 U. S. 288, at 340 (1936). In generating electricity from the water power developed as a necessary incident of the Wilson Dam, and in purchasing power lines to transmit the electricity to market, the government was merely "disposing of the energy itself which simply is the mechanical energy, incidental to falling water at the dam, converted into the electrical energy which is susceptible of transmission."

the use of the energy, but that the result was passively assumed to follow from the more limited restriction.[7] Therefore, of the two possible interpretations, the court has not only chosen the one which is less likely to hamper industrial progress, but one which does not violate the parties' active intention.

7. In discussing the construction of apparently limited purpose grants, the court in Fisk v. Wilber, 7 Barb. 395, at 402, 403 (N. Y. 1849) expressed the belief that although "the grantees in many cases purchased with the intention of applying the water to the propulsion of the mills and machinery mentioned . . . yet we can scarcely conceive . . . that the parties should have contemplated any other than the grant of an . . . unqualified right. . . ."